

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)
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)

XO Communications Services, Inc.)
Request for Review)
of Decision of the Universal Service)
Administrator)
_____)

WC Docket No. 06-122

**REPLY COMMENTS OF
XO COMMUNICATIONS SERVICES, INC.**

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XO Communications Services, Inc. (“XOCS”), through its undersigned counsel, respectfully files this reply to comments submitted in response to its Request for Review of Decision of the Universal Service Administrator (“Request for Review”).¹ The comments of AT&T, Verizon, Qwest and Level 3/PAETEC unanimously support XOCS’s appeal. On the issue of the jurisdiction of Dedicated Transport Services, commenters agree that XOCS properly categorized its services as intrastate service revenues and that the Universal Service Administrative Company (“USAC”) misapplied the so-called 10% Rule to shift these revenues into the Fund. Regarding XOCS’s MPLS-enabled Multi Transport Network Service (“MTNS”), commenters concur with XOCS’s classification of the service as an information service.

¹ *In re: XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket 06-122 (filed Dec. 29, 2010) (“Request for Review”). See *Public Notice Wireline Competition Bureau Seeks Comment on XO Communications Services, Inc. Request for Review of a Decision by the Universal Service Administrative Company*, DA 11-24 (rel. Jan. 6, 2011).

Furthermore, commenters support XOCS's position that wholesale carriers are not bound by the Form 499-A Instructions when presenting evidence to justify classifying and reporting revenues from resellers. Finally, commenters overwhelmingly agree that the Wireline Competition Bureau's asymmetrical one year limit on downward adjustments to the Form 499-A is arbitrary and capricious.

I. DEDICATED TRANSPORT SERVICES

Commenters addressing the issue wholly support XOCS's position that USAC erred in reclassifying revenues from physically intrastate Dedicated Transport Services ("DTS") as interstate revenues.² Level 3 and PAETEC ("Level 3/PAETEC"), for example, in joint comments agree with XOCS that USAC misinterpreted and misapplied the Commission's 10% Rule in the audit findings. Level 3/PAETEC note that "since 1989 the Commission has held again and again that intrastate facilities are jurisdictionally interstate *only if* the customer certifies that more than ten percent of the traffic on that line is interstate in nature."³ Level 3/PAETEC also noted that "the Commission has never indicated that this rule (or certification thereunder) was meant to achieve the opposite -- to confirm that an intrastate line was really intrastate."⁴

Similarly, Qwest accurately stated in its comments that "the history of the 10% rule supports a presumption that the traffic carried over a private line where the end points of the circuit are in the same state is intrastate traffic, unless there is a customer representation that

² See Comments of Qwest Communications International Inc., at 2, WC Docket No. 06-122 (Feb. 8, 2011) ("Qwest Comments"); Comments of Level 3 Communications, LLC and PAETEC Holding Corp., at 3-5, WC Docket No. 06-122, (Feb. 8, 2011) ("Level 3/PAETEC Comments").

³ Level 3/PAETEC Comments at 3.

⁴ Level 3/PAETEC Comments, Attachment A (Comments of Level 3 Communications, LLC and PAETEC Communications, Inc. at 8).

more than 10% of the traffic to be carried over the line will be interstate in nature.”⁵ Put simply, the 10% Rule maintains the presumption that physically intrastate circuits are intrastate unless there is a clear demonstration to the contrary. USAC, on the other hand, has flipped this presumption, and seeks to use the 10% Rule to classify all geographically intrastate circuits under federal jurisdiction unless and until such circuits are proven to be intrastate. The commenters agreed with XOCS that USAC’s position is clearly contrary to the FCC’s rules.

Commenters also highlight the adverse impact USAC’s position would have on states. In its Request for Review XOCS noted that USAC’s current interpretation and application of the 10% Rule would eliminate state regulation over virtually all physically intrastate private lines and, consequently, would reduce intrastate revenues, taxes and regulatory surcharges paid to states.⁶ Level 3/PAETEC agreed with this concern, stating:

[s]tates would thus cede regulatory authority over all private lines sold within their boundaries, which would in turn result in a drop in reporting of -- and corresponding regulatory payments based on -- intrastate revenues associated with these private lines.”⁷

The Universal Service Fund cannot be interpreted in a way that overruns the Separations process. As NARUC cautioned in another context that implicated federal USF revenues, FCC actions cannot “undermine State universal service and infrastructure deployment programs by revising without caveat the federal contribution mechanism or addressing required adjustments to the Part 36 separations rules.”⁸ USAC’s misinterpretation of the 10% Rule, if allowed to stand, could do just this.

⁵ Qwest Comments at 3 (emphasis added).

⁶ *Request for Review* at 26-27.

⁷ Level 3/PAETEC Comments at 4.

⁸ Initial Comments of the National Association of Regulatory Utility Commissioners, at 5, WC Docket No. 05-337 et al, (Nov. 26, 2008).

In addition, commenters also support XOCS's position that the characteristics of a private line circuit may be determined by factors other than a single customer certification.

XOCS showed that it considered a number of factors in its classification analysis, such as the end points of the circuits, the fact that XOCS configured the facilities as a closed network and the identity and nature of its customers.⁹ Qwest contended that although the existence of a customer certification should be conclusive, in the absence of a customer certification,

other indicia of the nature of the traffic should be considered by the auditor, such as those noted by XOCS. That information could include the end points of the circuit, the manner in which the circuit was configured, a Request for Proposal or contract language reflecting the purposes for which the circuit was provisioned, or current information from the customer as to how the circuits were used.¹⁰

USAC erred by not considering the evidence provided by XOCS to support its USF reporting. Had it considered the evidence, USAC would have found that XOCS reasonably classified the circuits as intrastate.

In summary, the comments discussed above provide strong support for XOCS's position that USAC misinterpreted and misapplied the Commission's 10% Rule when USAC chose to reclassify XOCS's DTS revenues. USAC's requirement that XOCS provide proof that *less than 10%* of the traffic carried on its DTS circuits is interstate misinterprets the Commission's 10% Rule to create a presumption in favor of interstate classification. Such a "land grab" would profoundly alter the balance between interstate and intrastate jurisdictions, thereby making virtually all physically interstate circuits subject to federal jurisdiction only. USAC's creation of a presumption is incorrect and beyond its authority. Moreover, by creating a presumption of interstate service, USAC *ignored* evidence ordinarily used to determine the

⁹ *Request for Review* at 13-14.

¹⁰ Qwest Comments at 2.

classification of a circuit — such as its end points and how it is configured. For these reasons the Commission should reverse USAC’s decision.

II. XOCS’S MPLS-BASED MULTI-TRANSPORT NETWORK SERVICE

Among those commenters addressing the proper classification of MPLS-based services, the record unanimously supports XOCS’s Request for Review. In particular, the comments confirm that it is a long standing industry practice for carriers to classify MPLS-based services as information services and that the FCC is aware of this practice.

XOCS classified its MTNS service revenues as information service revenues based on features of its MPLS network including protocol processing technology and the offering of wireline broadband Internet access as part of the service.¹¹ Verizon confirmed in its comments that “*providers have uniformly treated* many MPLS-enabled services as non-assessable information services for many years. They have done so because, as described above, the Commission’s rules and precedent suggest that these services are ‘information services’ and thus that contributions on them are not required.”¹² Further, Verizon noted that “[t]he Commission has long been aware of, and at a minimum acquiesced in, the industry’s understanding that many MPLS-enabled services are not subject to universal service contributions.”¹³ Accordingly, XOCS’s classification of its MTNS revenues as information service revenues was in line with the industry’s general treatment of MPLS-based MTNS services.

¹¹ *Request for Review* at 48.

¹² Comments of Verizon, at 11, WC Docket No. 06-122 (Feb. 8, 2011) (“Verizon Comments”) (emphasis added).

¹³ Verizon Comments at 12.

In its Request for Review, XOCS protested USAC's reclassification of its MTNS services on the grounds that USAC initially did not conduct any investigation into the actual features of the services and then later based its reclassification on a review of marketing materials, designed for limited sales-related purposes, on XOCS's website.¹⁴ Level 3/PAETEC agrees with XOCS that USAC cannot reclassify the service without a comprehensive analysis of whether XOCS's services meet the definition of information services.¹⁵ Specifically, Level 3/PAETEC stated:

USAC may not classify a service as 'telecommunications' based on the wireline transmission facilities (T-1 or MPLS) used to provide the service or the names used to market it. It must evaluate the service provided, from the perspective of the end user, to determine whether it qualifies as 'information' or 'interstate telecommunication'.¹⁶

Because XOCS's MTNS services "always offers Internet access," Level 3/PAETEC agreed with XOCS that its service appeared to satisfy the Commission's test for whether a service was an information service.¹⁷

Similarly, Verizon questioned the sufficiency of USAC's analysis of MTNS. "To the extent that USAC determined XO's MPLS-enabled service was assessable simply because it used MPLS and did not determine whether the service was in fact a telecommunications service," Verizon argued, "[USAC] erred and that determination should be reversed."¹⁸ AT&T agrees that it "would be incorrect for USAC to treat all MPLS-enabled services as

¹⁴ *Request for Review* at 52.

¹⁵ Level 3/PAETEC Comments at 7.

¹⁶ Level 3/PAETEC Comments at 7 (internal citations omitted).

¹⁷ Level 3/PAETEC Comments at 2.

¹⁸ Verizon Comments at 3.

telecommunications services.”¹⁹ Instead, AT&T advocated for a review of XOCS’ service on its merits:

On review, the Bureau will have to conduct a factual, service-specific inquiry of XO’s MTNS to determine whether it should grant XO’s request.²⁰

XOCS agrees with the commenters that classification requires a more comprehensive review of the features and attributes of MTNS than was performed by USAC. USAC failed to make that detailed analysis of the service in question. By contrast, XO has presented persuasive evidence that it properly classified its MTNS services as information services. Upon review, the Commission should consider the evidence presented by XOCS and confirm that its classification of MTNS as an information service is consistent with FCC precedent.

III. RESELLER REVENUE

With respect to reseller revenue, XOCS challenged USAC’s reclassification of revenues from a handful of resellers for whom XOCS relied on evidence *other than* a classification executed in 2007 satisfy the “reasonable expectation” standard for classifying resale revenues. OCS demonstrated in its Request for Review that USAC erroneously attempted to apply the Form 499-A Instructions as binding rules and unreasonably rejected other reliable proof that XOCS provided in support of its classification of certain reseller revenues.²¹ XOCS requested the Commission reverse USAC’s decision and require it to accept XOCS’s classification and reporting of reseller revenues.

¹⁹ Comments of AT&T, at 8, WC Docket No.06-122 (Feb. 8, 2011) (“AT&T Comments”).

²⁰ *Id.* AT&T did not believe that the public information available was sufficient to make the required determination. *Id.*

²¹ *Request for Review* at 36.

Commenters addressing the issue overwhelmingly agree with XOCS. AT&T expressed support for XOCS's reliance on confirmatory certifications during the audit, stating, "the Bureau should find that XO's confirmatory certifications from these non-contributing, intermediate resellers provide adequate support for its decision to exclude these resellers' revenues from its contribution base, and the Bureau should reverse USAC's decision to reclassify such revenues."²² AT&T also argued that USAC should hold the resellers, not the wholesale filers, responsible for any inaccuracies in their certifications: "Underlying this USAC audit finding . . . is the erroneous notion that the wholesale provider is somehow benefiting by accepting a resellers' certification and it should therefore be held financially accountable for any inaccuracies in its resellers' certifications. . . . If USAC determines a reseller failed to make adequate contributions, it should direct its collection activities to the reseller, not to the reseller's wholesale provider such as XO."²³

Qwest similarly agreed with XOCS that the Form 499-A Instructions are only "non-binding guidance"²⁴ and asserted that "[f]ollowing the guidance should provide sufficient proof during an audit of proper revenue classification. But a filer that fails to do so should still be able to provide other proof that it properly classified the revenues in question."²⁵

Wholesale providers such as AT&T and Qwest know full well the increasingly unrealistic burdens that USAC is imposing on wholesale carriers. By reflexively applying the Form 499-A Instructions as if they were binding rules, USAC has erroneously limited wholesale carriers to a single method of proof for reseller revenues. However, as the Commission has

²² AT&T Comments at 4.

²³ AT&T Comments at 4.

²⁴ Qwest Comments at 3.

²⁵ Qwest Comments at 4.

made clear, the Instructions present a “safe harbor” for wholesale carriers, but such carriers are free to rely upon “other reliable proof” to justify revenue as resale revenue. Industry participants that must operate under USAC’s stringent environment agree that USAC has gone too far in its rejection of a carrier’s documentation. The Commission should direct USAC to accept these other forms of evidence supporting XOCS’s classification of reseller revenues and to reverse its reclassification of XOCS’s reseller revenues.

IV. THE ASYMETRIC ONE YEAR RESTRICTION ON FORM 499-A REVISIONS

XOCS argued in its Request for Review that the rule purporting to limit Form 499-A revisions resulting in decreased contributions is arbitrary and capricious.²⁶ Specifically, XOCS cited three appeals - each pending since 2005 - filed on the grounds that the Bureau exceeded its authority to adopt administrative rules when it adopted the substantive one-year downward revision restriction, that adoption of the restriction failed to follow the Administrative Procedure Act’s notice and comment rulemaking requirements and that the restriction was arbitrary and capricious.²⁷ Six years have passed since those appeals were filed, and both the problem and grounds for appeals remain relevant.

In their comments, Qwest, AT&T and Verizon each noted the still-contentious nature of the asymmetrical one-year restriction. Qwest stated that “the lawfulness of this rule has been pending since it was implemented” and that Qwest “continues to believe that the one-way one-year limitations period on downward adjustments to previously reported revenue is unlawful.”²⁸ Similarly, AT&T explained that several parties, including AT&T, had challenged

²⁶ *Request for Review* at 63-66. *See also*, Qwest Comments at 5-6; AT&T Comments at 5-6 and Verizon at 17-19.

²⁷ *Request for Review* at 64-66 *citing* Applications for Review by SBC Communications, Inc. (“AT&T”), Qwest Communications International, Inc., and Business Discount Plan, Inc. (all filed Jan. 10, 2005).

²⁸ Qwest Comments at 5-6.

the order establishing the asymmetrical one-year deadline for downward revisions, but “the Commission’s inaction has made things worse.”²⁹ Until the Commission issues procedurally proper final rules, AT&T persuasively argued, “it should direct USAC to accept all Form 499-A revisions that providers might file – including XO’s revenues to its 2006 and 2007 Form 499-A filings . . . – so long as the revisions comply with the standard that existed prior to the Bureau’s *Form 499-A Revision Deadline Order*.”³⁰

Verizon accurately noted that the one-year restriction “was beyond the Bureau’s authority and should have been the subject of notice and comment.”³¹ In addition, Verizon stated that the restriction was arbitrary and capricious because “adopting a one-year deadline for filing changes that would decrease a carrier’s USF contribution without a corresponding limit on the obligation to re-file an increase in contributions assures that many carriers will make significant USF contributions in excess of what they actually owe.”³²

Moreover, regardless of the validity of the one-year rule in the abstract, Qwest supported permitting XOCS to make the revisions in the context of this audit. “In any audit,” it argued, “any findings resulting in upward adjustments should be offset against any findings resulting in downward adjustments for the audit period.”³³

Collectively, the comments illustrate the arbitrary and capricious nature of the one year restriction on Form 499-A revisions that would result in decreased contributions and the importance to industry participants of a reversal of the restriction. The issue is not new to the Commission: it has been pending before the Commission for six years. Until the Commission

²⁹ AT&T Comments at 6.

³⁰ AT&T Comments at 6.

³¹ Verizon Comments at 17.

³² Verizon Comments at 19.

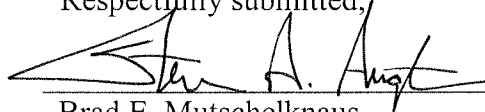
³³ Qwest Comments at 5.

eliminates this arbitrary and capricious restriction or makes it symmetrical, filers that discover errors after one year that would result in decreased contributions should be permitted to apply the erroneous overpayments as credits to future contribution amounts.

V. CONCLUSION

It is evident from the uniformly supportive comments filed in response to XOCS's Request for Review that the concerns and frustrations addressed by XOCS are not unique to XOCS. The comments make clear that the USAC decisions challenged here are at odds with Commission positions and precedent, causing harm to the industry as a whole. The Commission must step in and provide firm and clear guidance to USAC so that such erroneous decisions immediately are corrected in the case of XOCS's audit and are not repeated in the future.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brad E. Mutschelknaus", is written over a horizontal line.

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